Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 81-4003
D.C. No. C 78-1192 AJZ

William Joseph Legner,
Plaintiff-Appellant,

vs.

Union Pacific Railroad Company,
Defendant-Appellee.

[Filed May 26, 1982]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California

Honorable Alfonso J. Zirpoli,
Senior United States District Judge, Presiding

Argued and Submitted: February 12, 1982

Before: MERRILL, KENNEDY, and CANBY, Circuit Judges.

William T. Legner, fifty-four years old at the time of his discharge, filed an action against Union Pacific Railroad Co. (the Railroad) under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976). The district court granted the Railroad's motion for directed verdict, and Legner appeals from the judgment entered against him. After a review of the trial record, we conclude the district court did not err and affirm.

Legner concedes his position as Assistant Chief Clerk to Traffic Manager was abolished for legitimate business reasons. The Railroad offered to transfer Legner to a clerk/stenographer position in Oakland and claims it did so because the job was the best one for which Legner was qualified and for which there was an opening. Legner, informed that other jobs might open in the future, but apparently unwilling to take the clerk/stenographer position even temporarily, refused the transfer and was terminated on or about July 1, 1976.

Legner contends that in determining whether or not a prima facie case was established, this court must analyze the positions which opened after he left the Railroad. In the circumstances of this case, if the clerk/stenographer position was the only available job to which Legner merited a transfer during the period before his refusal to take it and his termination, then it would be inappropriate for this court to consider positions opening later. For purposes of contesting the directed verdict, then, the case stands or falls on his claim that the evidence can support a finding that he was unlawfully refused a position available before July 1, 1976.

Legner argues that the Railroad did illegally reject him for alternative positions available before July 1, 1976, when it: (1) allowed one Borrowman to take over some of Legner's former duties for several weeks pending the complete abolition of those tasks; (2) refused to promote Legner to a position as Traffic Agent; and (3) failed to elevate Legner to the management training program. Legner may establish that these latter two actions by the Railroad supported a prima facie case of age discrimination by showing: (i) he belonged to the protected class; (ii) he

applied and was qualified for an available position; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the Railroad continued to seek applicants from persons of his qualifications. *Douglas v. Anderson*, 656 F.2d 528, 531-33 (9th Cir. 1981); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). Similarly, he may establish a prima facie case based on the use of the alleged substitute if he shows: (i) he was a member of the protected class; (ii) he was performing his job in a satisfactory manner; (iii) he was discharged; and (iv) the substitute was in fact a replacement who was a substantially younger employee with equal or inferior qualifications. *Douglas*, 656 F.2d at 532-33. These standards are flexible and can be modified to accommodate the particular case. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979).

If a plaintiff establishes a prima facie case, the defendant must offer evidence of a legitimate, nondiscriminatory reason for rejecting plaintiff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To sustain a directed verdict against the prima facie case, the defendant "must establish that a jury could not reasonably find that age discrimination was a determining factor" in its actions. *Douglas*, 656 F.2d at 533. When the evidence of a legitimate, nondiscriminatory reason is sufficiently clear to undermine any permissible inference of discrimination, the plaintiff must offer some credible evidence that the defendant's nondiscriminatory reason was a mere pretext for age discrimination. *See id.* at 534-35.

Applying these standards to the instant case, we conclude the district court correctly granted the Railroad's motion for a directed verdict. Legner failed to introduce

any direct evidence of age discrimination. The Railroad's use of Borrowman to perform some of Legner's tasks for several weeks during the phase out period cannot even be categorized as a replacement of Legner, much less a discriminatory replacement. Legner was not promoted to the management training program or the Traffic Agent position because he was unqualified. The uncontested evidence introduced by Legner was that those promotions only went to employees rated "1" or "2," and Legner had an overall rating of "3." Though one of Legner's evaluations indicated he was ready for promotion to Traffic Agent, though one management employee from the Railroad stated that Legner was qualified given *no other people* he might promote, and though Legner did introduce some statistical data, these were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the Railroad had a legitimate, nondiscriminatory motive prevented a jury from finding that age discrimination was a determining factor in the Railroad's actions. Because Legner did not offer credible and sufficient evidence that the Railroad's nondiscriminatory reason was a mere pretext for age discrimination, a directed verdict on the issue was appropriate. Legner's other contentions are equally without merit, and we therefore affirm.

AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4003

William Joseph Legner,
Plaintiff-Appellant,

vs.

Union Pacific Railroad Company,
Defendant-Appellee.

[Filed Aug. 31, 1982]

ORDER

Before: MERRILL, KENNEDY, and CANBY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Canby have voted to reject the suggestion for a rehearing en banc, and Judge Merrill has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix C

United States District Court
For the Northern District of California

No. C 78 1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Oct. 16, 1980]

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered in this action,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Union Pacific Railroad Company take judgment, that plaintiff William J. Legner take nothing by his complaint, and that the parties shall bear their own costs.

Dated: October 16, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix D

United States District Court
For the Northern District of California

No. C 78 1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Oct. 16, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before a jury on February 4, 1980. Following presentation of evidence on February 4 and February 5, 1980, plaintiff rested. Defendant moved for a directed verdict pursuant to Rule 50(a), Fed.R.Civ.P., the motion was argued before the court by counsel for the parties, and the court ruled in favor of defendant on February 5, 1980.

The court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff William J. Legner was at the time of his termination of employment with defendant Union Pacific Railroad fifty-four years of age.

2. Defendant Union Pacific Railroad is and at all relevant times was a corporation engaged in the business of interstate railroad carriage, with headquarters in Omaha, Nebraska, and offices throughout the United States.

3. The abolition of plaintiff's position as Assistant Chief Clerk to Traffic Manager was for sound business reasons.

4. The evidence presented is not susceptible to a reasonable inference that there was at the time of the termination of plaintiff's employment any position, including those of Chief Clerk to Traffic Manager, Chief Clerk to Traffic Agent in the Reno office, which were both available and for which plaintiff was qualified.

5. The evidence presented is not susceptible to a reasonable inference that age played any determining factor in the employment decisions of defendant with respect to plaintiff.

6. Plaintiff was offered reasonable comparable alternative employment by defendant, and rejected it.

7. The evidence presented points so strongly in defendant's favor that reasonable jurors could not arrive at a verdict other than for defendant.

CONCLUSIONS OF LAW

1. This court has jurisdiction over plaintiff's allegations of age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sections 621 *et seq.*, pursuant to the provisions of 29 U.S.C. section 633a(c), 28 U.S.C. section 1331, 28 U.S.C. section 1337, and 28 U.S.C. section 1343.

2. On motion for directed verdict in favor of defendant, the evidence and inferences therefrom must be viewed in a light most favorable to plaintiff and against defendant.

3. Viewing the evidence in that light, the court concludes that the evidence adduced by plaintiff failed to es-

tablish a prima facie case of age discrimination, *Connelly v. Joseph Schlitz Brewing Co.*, 600 F.2d 461 (5th Cir. 1979).

4. Viewing the evidence in that light, the court concludes that the evidence adduced by plaintiff affirmatively rebuts the contention that defendant engaged in any discrimination against plaintiff on account of his age.

Accordingly, defendant's motion for directed verdict is hereby granted.

Dated: October 16, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix E

United States District Court
For the Northern District of California

No. C 78-1192 AJZ

William Joseph Legner,
Plaintiff,

vs.

Union Pacific Railroad Company,
Defendant.

[Filed Dec. 3, 1980]

ORDER DENYING MOTIONS FOR NEW TRIAL AND TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's motions for a new trial and to amend findings of fact and conclusions of law came on regularly for hearing on November 24, 1980, at 1:30 p.m. The court, having heard oral argument and considered the papers submitted by both parties, makes the following order:

1. In granting defendant's motion for directed verdict, the court applied the proper standard of proof and viewed the evidence in the light most favorable to plaintiff. Plaintiff's motion for a new trial is therefore denied.

2. The findings of fact and conclusions of law entered in this case adequately set forth the bases for the court's decision. Plaintiff's motion to amend the findings of fact and conclusions of law is therefore denied.

SO ORDERED.

Dated: December 3, 1980

/s/ ALFONSO J. ZIRPOLI
United States District Judge

Appendix F

Tuesday, February 5, 1980

ORAL RULING

The Court: Well, what is disturbing to me is that I still don't see the evidence which would support a finding that there was an available position for which the plaintiff was qualified at the time of the termination. That is the thing that disturbs me.

If I am satisfied that the evidence won't support a finding of that nature, then I would have no alternative—

Mr. Allen: Again, it leaves to the control—

The Court: Then there is the further evidence that the plaintiff was offered what I would consider reasonably similar employment, which he declined. I don't think the evidence will support a finding that there was an available promotion, and further evidence is demonstrated by exhibit No. 2 as to the offer of a reasonably similar employment. True, it meant a transfer to a union position, but, nevertheless, it was an adequate effort on the part of the defendant.

Accordingly, I would say that the facts of this case and the inferences to be drawn therefrom point so strongly and so overwhelmingly in favor of the defendant that the court believes that reasonable men could not arrive at a contrary verdict. The evidence is not susceptible of a reasonable inference that age played a part in the decisions regarding the plaintiff, and, accordingly, I am going to direct a verdict in favor of the defendant.

Mr. Allen: Your honor, could you reserve your ruling until tomorrow?

The Court: No, I have made my ruling. I will just inform the jury of it tomorrow. That is all.

Mr. Whitcomb: Would you like counsel to be present in the morning?

The Court: Absolutely. The jury is going to be here. I will advise them of what I have done.

You can prepare a judgment accordingly.

Mr. Whitcomb: Yes, your honor.

(Proceedings adjourned for the day.)

Appendix G

Wednesday, February 6, 1980: 10:00 AM

PROCEEDINGS:

The Court: The jurors are all present.

Ladies and gentlemen of the jury, after yesterday's recess, the attorney for the defendant made a motion for a directed verdict in favor of his client.

After hearing arguments, the court granted that motion, thereby ending the case in favor of the defendant.

The court did so because there can be no doubt that the termination of plaintiff's employment was for sound business reasons, and was in no way related to plaintiff's age. Additionally, the evidence disclosed that the plaintiff was offerred reasonably comparable alternative employment, which he rejected.

Since the evidence will not support a finding that there was at the time of termination of his employment an available position for which he was qualified, and to which he could be promoted, the court is without evidence susceptible to a reasonable inference that age was a determining factor or played any significant part in the decisions regarding the plaintiff.

In short, the facts of this case and the inferences to be drawn therefrom point so strongly in favor of the defendant, that the court believes that reasonable jurors could not arrive at a contrary verdict.

And hence, as I indictated, I granted the motion for a directed verdict, which ends the need for your services here. I want to thank you. It is essential that we have the jurors because, at least until the plaintiff's case is in, we

have no way of evaluating the need and degree to which the services of the jury will be further required.

I want to thank you for the services you have rendered in this case, and you are now excused until further notice.

All right, gentlemen, we will be in recess.

(Proceedings adjourned.)

Appendix H

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act [29 USCS §§ 621 et seq;] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Dec. 15, 1967, P. L. 90-202, § 2, 81 Stat. 602.)

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act (Pub. L. 90-202, § 4, 7, Dec. 15, 1967, 81 Stat. 603; as amended Pub. L. 95-256 § 2 (a), Apr. 6, 1978, 92 Stat. 189.)

§ 626. Recordkeeping, investigation and enforcement

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial. (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

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(Pub. L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; as amended Pub. L. 95-256, § 4 (a), (b)(1), (c)(1), April 6, 1978, 92 Stat. 190, 191.)

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age. The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

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(Pub. L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; as amended Pub. L. 95-256, § 3(a), Apr. 6, 1978, 92 Stat. 189.)